



## **Agricultural Marketing Service**

### **7 CFR Part 983**

**[Doc. No. AMS-SC-21-0068; SC21-983-1 FR]**

#### **Increased Assessment Rate for Pistachios**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation from the Administrative Committee for Pistachios (Committee) to increase the assessment rate established for the 2021-22 and subsequent production years. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Peter Sommers, Marketing Specialist, or Gary Olson, Regional Director, West Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (503)326-2724 or Email: [PeterR.Sommers@usda.gov](mailto:PeterR.Sommers@usda.gov) or [GaryD.Olson@usda.gov](mailto:GaryD.Olson@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement and Order No. 983, as amended (7 CFR part 983), regulating the handling of pistachios grown in California, Arizona, and New Mexico. Part 983 (referred to as the “Order”) is effective under the Agricultural Marketing

Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of producers and handlers of pistachios operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. Agricultural Marketing Service (AMS) has determined this rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, pistachio handlers are subject to assessments. Funds to administer the Order are derived from such assessments. The assessment rate established herein is applicable to all assessable pistachios for the 2021-22 and subsequent production years and will continue until amended, suspended, or terminated. The production year runs from September 1 to August 31. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate from \$0.00015 per pound of pistachios, the rate established for the 2020-21 and subsequent production years, to \$0.0007 per pound of pistachios for the 2021-22 and subsequent production years.

The Order authorizes the Committee, with the approval of AMS, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. Members are familiar with the Committee's needs and with costs of goods and services in their local area and are in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting, and all directly affected persons have an opportunity to participate and provide input.

For the 2020-21 and subsequent production years, the Committee recommended, and AMS approved, an assessment rate of \$0.00015 per pound of pistachios. That assessment rate continued in effect from production year to production year until modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other information available to AMS.

The Committee met on July 20, 2021, and unanimously recommended expenditures of \$828,000 and an assessment rate of \$0.0007 per pound of pistachios

handled for the 2021-22 and subsequent production years. In comparison, the prior year's budgeted expenditures were \$679,800. The assessment rate of \$0.0007 is \$0.00055 higher than the rate previously in effect. The Committee recommended increasing the assessment rate to pay for additional Committee staff in preparation for the retirement of key staff positions (manager and administrative assistant) and to provide adequate income to cover all of the Committee's budgeted expenses for the 2021-22 production year.

Major expenditures recommended by the Committee for the 2021-22 production year include \$462,500 for personnel expenses, \$125,000 for research, \$100,000 for a contingency fund, \$82,700 for administration, and \$57,800 for office expenses. Budgeted expenses for these items in the 2020-21 production year were \$336,500, \$125,000, \$80,000, \$80,700, and \$57,600, respectively.

The Committee derived the recommended assessment rate by considering anticipated expenses, an estimated crop of 975 million pounds of pistachios, and the amount of funds available in the authorized reserve. Income derived from handler assessments, calculated at \$682,500 (975,000,000 pounds multiplied by \$0.0007 assessment rate), along with other income (\$220,200), will be adequate to cover budgeted expenses of \$828,000. Excess assessment revenue would be added to the Committee's reserve fund. Funds in the Committee's financial reserve are expected to be approximately \$385,157 at the end of the 2021-22 production year, which would be within the Order's requirement of no more than approximately two production years' budgeted expenses.

The assessment rate established by this rule will continue in effect indefinitely unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each production year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. Dates and times of Committee meetings are available from the Committee or AMS. Committee meetings are open to the public and interested persons may express their views at these meetings. AMS will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2022-23 production year budget, and those for subsequent production years, will be reviewed and, as appropriate, approved by AMS.

### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the AMS has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 19 handlers subject to regulation under the Order, and approximately 1,624 producers of pistachios in the production area. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$1,000,000, and small agricultural service firms have been defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the national average producer price for pistachios for the 2019-20 production year was \$2.75 per

pound. Committee data indicates 2019-20 production year total pistachio production was 582,111,271 pounds. The total 2019-20 production year value of the pistachio crop was calculated as \$1,600,805,995 (582,111,271 pounds times \$2.75 per pound equals \$1,600,805,995). Dividing the crop value by the estimated number of producers (1,624) yields an estimated average receipt per producer of \$985,718, which is just below the SBA threshold for small producers.

According to AMS Market News data, the reported terminal price for 2021 for pistachios ranged between \$150.00 to \$250.00 per 25-pound carton. The average of this range is \$200.00 (\$150.00 plus \$250.00 divided by 2 equals \$200.00). Dividing the average value by the 25-pound carton yields an estimated average price per pound of \$8.00 (\$200.00 average value for 25-pound carton divided by 25). Multiplying the 2019-20 production year total pistachio production of 582,111,271 pounds by the estimated average price per pound of \$8.00 equals \$4,656,890,168. Dividing this figure by 19 regulated handlers yields estimated average annual handler receipts of \$245,099,483, which is well above the SBA threshold for small agriculture service firms.

Therefore, using the above data, and assuming a normal distribution, the majority of pistachio producers may be classified as small entities and the majority of handlers of pistachios may be classified as large entities.

The assessment rate of \$0.0007 that the Committee recommended complies with § 983.71(b) of the Order which states that any assessment rate must not exceed one-half of one percent of the average price received by producers in the preceding production year. The average price received by producers in the preceding production year was \$2.75 per pound of pistachios. Thus, \$2.75 times 0.5 percent equals \$0.01375, which is greater than the assessment rate of \$0.0007.

This rule increases the assessment rate collected from handlers for the 2021-22 and subsequent production years from \$0.00015 to \$0.0007 per pound of pistachios. The

Committee unanimously recommended 2021-22 production year expenditures of \$828,000 and an assessment rate of \$0.0007 per pound of pistachios handled. The assessment rate of \$0.0007 per pound of pistachios is \$0.00055 higher than the current rate. The volume of assessable pistachios for the 2021-22 production year is estimated to be 975 million pounds. Thus, the \$0.0007 per pound assessment rate should provide \$682,500 in assessment income (975,000,000 multiplied by \$0.0007). Income derived from handler assessments, along with an estimated \$220,000 of other income, will be adequate to cover budgeted expenses for the 2021-22 production year.

Major expenditures recommended by the Committee for the 2021-22 production year include \$462,500 for personnel expenses, \$125,000 for research, \$100,000 for a contingency fund, \$82,700 for administration, and \$57,800 for office expenses. Budgeted expenses for these items in the 2020-21 production year were \$336,500, \$125,000, \$80,000, \$80,700, and \$57,600, respectively.

The Committee recommended increasing the assessment rate to cover the Committee's budgeted expenses for the 2021-22 production year and maintain its financial reserve. Additionally, the Committee has approved a hiring search for both the Manager and Administrative Assistant, as both are expected to retire in the near future. The increased assessment income will accommodate the hiring of additional staff to aid in the transition.

Prior to arriving at this budget and assessment rate recommendation, the Committee discussed an alternative that considered the timing of when the additional staff salaries would be required to assist the management transition. However, the Committee determined that the recommended assessment rate will fully fund budgeted expenses, avoid utilizing reserves, and permit the Committee to hire the needed staff to facilitate the replacement of the key management positions.

This rule increases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the Order.

The Committee's meeting was widely publicized throughout the pistachio industry. All interested persons were invited to attend the meeting and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the July 20, 2021, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue. Interested persons were invited to submit comments on this rule, including regulatory and information collection impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0215, Pistachios Grown in California, Arizona, and New Mexico. No changes in those requirements are necessary as a result of this rule. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large pistachio handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services.

AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.



A proposed rule concerning this action was published in the **Federal Register** on December 6, 2021 (86 FR 68932). Copies of the proposal were provided by the Committee to members and handlers. Finally, the proposed rule was made available through the internet by AMS and the **Federal Register**. A 30-day comment period ending January 5, 2022, was provided to allow interested persons to respond to the proposal.

No comments were received. Accordingly, no changes were made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

#### **List of Subjects in 7 CFR Part 983**

Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service is amending 7 CFR part 983 as follows:

#### **PART 983 – PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO**

1. The authority citation for 7 CFR part 983 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Section 983.253 is revised to read as follows:

**§ 983.253 Assessment rate.**

On and after September 1, 2021, an assessment rate of \$0.0007 per pound is established for California, Arizona, and New Mexico pistachios.

**Erin Morris**

*Associate Administrator,*

*Agricultural Marketing Service*

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